

MAY 31 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1444

CAROL C. JOHNSON,

Petitioner,

—v.—

LOUIS J. LEFKOWITZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
FILED APRIL 11, 1978

**PETITIONER'S BRIEF IN REPLY TO THE BRIEF
FOR RESPONDENTS IN OPPOSITION
FILED MAY 15, 1978**

CAROL C. JOHNSON
Attorney for Petitioner
600 West 111th Street
New York, N. Y. 10025

May 30, 1978

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1444

CAROL C. JOHNSON,

Petitioner,

—v.—

LOUIS J. LEFKOWITZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED APRIL 11, 1978

**PETITIONER'S BRIEF IN REPLY TO THE BRIEF
FOR RESPONDENTS IN OPPOSITION
FILED MAY 15, 1978**

*To the Honorable Chief Justice of the United States and
the Honorable Associate Justices of the Supreme Court
of the United States*

Respondents' brief in no way attempts to meet the question of the conflict between the federal courts of appeal set forth in the Petition, which unless passed upon by this Court will continue to result in endless confusion and repeated applications for writs of certiorari to this Court for settlement of the questions involved and will continue to adversely affect the lives of 20,000,000 citizens over 65 years of age and their countless dependents.

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted to allow appellate review herein so that the questions involved may be fully briefed and argued before this Court or return for the case to go to trial.

The following may help to illustrate why a full hearing should be had. (All emphasis is supplied.)

On page 2 of the Respondents' Brief is a statement under the heading "FACTS" which statement is contrary to the allegations of the Complaint which Respondents' pre-answer motion addressed to the Complaint admits to be true.

He states that Petitioner—a *tenured* attorney—an employee in the Law Department *was mandatorily retired when he reached the age of 70.*

This he would like the Court to believe so that the Court would accept his statement on page 10, line 18, that pursuant to Section 70(b) of the N.Y.S. Superannuation Retirement Act, Petitioner's permanent tenured competitive classified Civil Service Senior Attorney-Realty status ended automatically when he reached age 70 and with it ended his entitlement to a hearing before termination.

Yet Mr. Lefkowitz knows that Section 70(c) states clearly that NOTWITHSTANDING Section 70(b) continuances can be granted—even up to age 78 and he knows that under said Section (c) he consented to such continuances up to March 31, 1974.

Mr. Lefkowitz also knows that as Attorney-General he wrote a formal opinion on May 29, 1964 to the Civil Service that "it would be extremely difficult to rationalize a determination that an employee in 'Government Service' as defined in Retirement and Social Security Law Section 2 Subdivision 11, working each day as an employee of

the State and receiving full salary (and such is Petitioner's case-supplied) had been retired by 'operation of law' for a period of several years * * *".

The headnote to that opinion states that the man had remained in State service beyond the age of 70.

Thus Mr. Lefkowitz interpreted the direction to retire the man at 70 to be suspended during the period that he was continued in his position as employee after age 70.

Clearly he knows that there was no retirement by operation of law of Petitioner herein upon the attainment of age 70 since he had consented that Petitioner herein be continued, as authorized by Section 70(c), by two continuances, first from June 30, 1973 thru December 31, 1973 and then thru March 31, 1974.

A letter from Mr. Lefkowitz's office dated April 10, 1974 states "upon occasion of your RECENT retirement * * *".

"Recent" would be March 31, 1974 not June 30, 1973.

Even as to the later date, March 31, 1974, the complaint alleges that there was no retirement simply an involuntary taking of Petitioner from the pay-roll. No notice ever having been given to Petitioner as to what if anything had been done with his third request for continuance—just arbitrary, capricious removal under color of state authority of Petitioner from the pay-roll as the complaint alleges and which is admitted as true.

A letter from the N.Y.S. Employees' Retirement System dated July 16, 1974 states—your retirement allowance is based on 11 years and 3 months of service. (January 1963 thru March 31, 1974.)

There was no retirement before the end of March 31, 1974 as can be seen from this letter.

Mr. Lefkowitz may even know of a formal opinion written by one of his predecessors, namely, Attorney-General John J. Bennett, Jr., to the Civil Service in 1941 reading as follows, "While I adhere to the view that in general, such applications should be made in advance of the required retirement date, I do not believe that the statutory provisions can be read as absolutely mandatory but should be interpreted as DIRECTORY."

Clearly the provision for continuances in Section 70(c) which can be granted NOTWITHSTANDING Section 70(b) indicates that the SHALL in Section 70(b) is DIRECTORY not MANDATORY.

The word is SHALL be retired not MUST be retired.

At no time, except by arbitrary and capricious action such as alleged in the Complaint, could Petitioner herein be CONSTITUTIONALLY taken off the payroll until his duly and timely third application for continuance had been duly processed as provided by the provisions of Section 70.

In the *Nurenberg v. Ward* case cited on page 10 of the Respondents' Brief the papers filed in the Appellate Division—one set sent to the Bar Association in New York City—shows that no brief was filed in support of the appeal.

The record on appeal further discloses that the verified answer in the case states that the employee was given notice that due to BUDGET CUT his employment was being terminated and the notice, also in the record, states that his retirement was made because of budget cut.

These matters can only be adequately treated by granting certiorari and setting the case for full briefs and oral argument or by reversal and sending the case on its way

to a trial to include the question of the constitutionality of the statute itself as well as the constitutionality of the abuse of its administration.

Most respectfully submitted,

CAROL C. JOHNSON
Attorney for Petitioner
 600 West 111th Street
 New York, New York 10025